STATE OF MICHIGAN

COURT OF APPEALS

NATIONAL STEEL CORPORATION,

Plaintiff–Appellant,

v

INSURANCE COMPANY OF NORTH AMERICA,

Defendant–Appellee.

UNPUBLISHED
February 7, 1997

No. 183832
Wayne Circuit Court
LC No. 91-420032

Before: Young, P.J., and Corrigan and M.J. Callahan,* JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10), and denying its cross-motion for summary disposition, brought pursuant to MCR 2.116(C)(9) & (10). We reverse and remand.

Plaintiff sued defendant, plaintiff's employer liability insurer, to recover settlement costs associated with a lawsuit brought by the estate of one of plaintiff's employees who was killed in the scope of employment. The estate's underlying complaint alleged intentional infliction of emotional distress and assault and battery. Defendant undertook plaintiff's defense, but reserved its right to contest liability based on an exclusion in plaintiff's insurance policy for "bodily injury intentionally caused or aggravated by you [plaintiff]." In the underlying suit, the circuit court dismissed the estate's complaint based on the exclusive remedy provision of the Michigan Workers' Disability Compensation Act ("WDCA"). In *Kachadoorian v Great Lakes Steel*, 168 Mich App 273; 424 NW2d 34 (1988), this Court reversed the circuit court's order based on the Michigan Supreme Court's decision in *Beauchamp v Dow Chemical Co*, 427 Mich 1; 398 NW2d 882 (1986). In *Beauchamp*, the Supreme Court recognized an "intentional tort" exception to the exclusive remedy provision of the WDCA. *Id*. at 11. The *Beauchamp* Court further held that a claim falls within the intentional tort exception if there is evidence that the employer acted or failed to act and was "substantially certain" that injury would occur.[1] *Id*. at 22, 25. In *Kachodoorian*, this Court held that the underlying facts

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* Circuit judge, sitting on the Court of Appeals by assignment.

supported a claim under *Beauchanp's* "substantial certainty" standard and remanded for further proceedings.

After trial commenced, plaintiff settled the estate's suit for $1,990,000, without defendant's permission. After plaintiff brought suit against defendant to recover the settlement costs, the circuit court entered summary disposition in favor of defendant. The circuit court held that if plaintiff had been found liable on the estate's claims based on the *Beauchamp* doctrine, then plaintiff would have been deemed to have committed an intentional tort within the insurance policy's exclusion. It further held that defendant could rely on the policy's exclusion, even though defendant improperly and untimely asserted its reservation of rights, since plaintiff was not prejudiced thereby. The circuit court later denied plaintiff's motion for reconsideration.

Plaintiff first argues that the trial court incorrectly equated the "substantial certainty" standard of *Beauchamp* with the "specific intent" standard of the policy exclusion. We agree.

In *Cavalier Mfg Co v Employers Ins of Wausau*, 211 Mich App 330, 334; 535 NW2d 583 (1995),[2] this Court held that a claim falling within the intentional tort exception to the WDCA's exclusive remedy provision would not necessarily be subject to an insurance policy that excluded coverage for "bodily injury intentionally caused by the insured." *Id*. The Court explained that for the policy exclusion to apply, the employer must act intentionally *with* the intent to cause injury. *Id*. at 335(citing *Transamerica Ins Co v Anderson*, 159 Mich App 441, 444; 407 NW2d 27 (1987). The Court then explained that the language in the intentional tort exception under the WDCA allowed a claim under circumstances where proof that the employer acted with intent to injure was not required. For example, the Court noted that the WDCA would allow claims upon proof that the employer "wilfully disregarded" "actual knowledge" that "injury was certain to occur." See MCL 418.131(1); MSA 17.237(131)(1). Thus, this Court reasoned that under some circumstances a claim would not constitute a true "intentional tort" as to fall within the language of the policy exclusion.

In this case, defendant's policy language is identical to the policy language at issue in *Cavalier*. Significantly, plaintiff's liability was subject to the *Beauchamp* standard that is less stringent than the liability contemplated by the statutory exception contemplated in *Cavalier*.[3] Accordingly, under the *Beauchamp* standard, the "intentional tort" exception would apply upon proof that an employer intended the act that caused his injury and was *substantially certain* that an injury would occur, *Beauchamp, supra* at 21, whereas the policy exclusion is triggered only upon the showing of a *specific intent to injure*. *Cavalier, supra* at 334. Therefore, the trial court erred in holding that the policy exclusion would have applied as a matter of law if *Beauchamp* had been satisfied.

Next, we are not persuaded that summary disposition in defendant's favor was appropriate because plaintiff settled the underlying suit without its permission. In general, an insured's breach of a "no action" clause excuses the insurer from providing liability pursuant to the insurance policy. *Coil Anodizers v Wolverine*, 120 Mich App 118, 123; 327 NW2d 416 (1982). However, upon notice, there is some burden on an insurer to act to protect its interest or those of its insured. *Alyas v Gillard*, 180 Mich App 154, 160; 446 NW2d 610 (1989). An insurance company cannot benefit by sitting idly

by, knowing of the litigation, and watching its insured become prejudiced. *Id.* It is a question of fact whether an insurance company acted in bad faith in refusing to participate in settlement negotiations. *Commercial Union Ins Co v Medical Protective Co*, 136 Mich App 412, 423; 356 NW2d 648 (1984), modified on other grounds 426 Mich 109; 393 NW2d 479 (1986). Because there was evidence presented on the record that defendant refused to participate in any way in the settlement negotiations, an issue of fact remained for jury determination, namely whether defendant acted in bad faith in refusing to participate in settlement negotiations. See *Id.* Therefore, summary disposition was inappropriate.

Plaintiff next argues that the trial court's holding that defendant could deny coverage, despite its untimely and improper reservation of rights, was in error. We disagree.

An insurer that undertakes the defense of an insured while having actual or constructive knowledge of facts that would allow avoidance of liability will be deemed to have waived its right to avoid coverage unless reasonable notice of the possible disclaimer is served to the insured. *Allstate v Keillor (On Remand),* 203 Mich App 36; 511 NW2d 702 (1993), modified 450 Mich 412; 537 NW2d 589 (1995). If reasonable notice is not served, a presumption of prejudice arises which, if unrebutted, will establish prejudice as a matter of law. *Multi-States Trans v Mich Mutual*, 154 Mich App 549, 556; 398 NW2d 462 (1986).

Plaintiff presented no evidence indicating that it was prejudiced by defendant's untimely notice of its reservation of rights. Defendant, on the other hand, presented sufficient evidence to rebut the presumption of prejudice created upon the trial court's finding that the notice was improper and untimely. Namely, defendant properly served plaintiff with its reservation of rights four months before the underlying suit went to trial or was settled. Furthermore, plaintiff was permitted to employ its attorney of choice to defend the underlying suit; it was even permitted to change attorneys midway through the case. Accordingly, we hold that the trial court correctly held that plaintiff was not prejudiced by defendant's improper and untimely notice.

Lastly, plaintiff argues that defendant should be estopped from denying coverage beyond plaintiff's $1,000,000 policy limit since defendant continually misrepresented to plaintiff during the pendency of the underlying suit that plaintiff's policy limit was $2,000,000. We disagree.

A misrepresentation claim requires reasonable reliance on a false representation. *Nieves v Bell Industries*, 204 Mich App 459, 464; 517 NW2d 235 (1994). There can be no fraud where a person has the means to determine that a representation is not true. *Id.* An insured is held to have knowledge of the terms of its insurance policy, even if it did not read them. *Auto-Owners Ins v Zimmerman*, 162 Mich App 459, 461; 412 NW2d 925 (1987).

Although the trial court did not rule on this issue since it held that plaintiff's claim was barred by the policy's intentional tort exclusion, it suggested that plaintiff would not be entitled to an award above its policy limit since it could not establish that it justifiably relied on defendant's misstatements regarding plaintiff's policy limit. We agree with the trial court's suggestion. There was evidence to support plaintiff's claim that defendant misstated plaintiff's policy limits throughout the underlying suit. However,

the policy clearly stated that its coverage limit was $1,000,000. Therefore, plaintiff could not have reasonably relied on defendant's misstatements. See *Nieves, supra*; *Zimmerman, supra*. Therefore, if coverage is determined to exist on remand, defendant is only liable up to plaintiff's policy limit.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Robert P. Young, Jr.
/s/ Maura D. Corrigan
/s/ Michael J. Callahan

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[1] On May 14, 1987, the Legislature amended MCL 418.131; MSA 17.237(131) to include an intentional tort exception to the exclusive remedy provision of the WDCA. See MCL 418.131(1); MSA 17.237(131)(1). This amendment while recognizing an intentional tort exception, requires proof that the employer specifically intended an injury and overruled *Beauchamp's* substantial certainty standard. *Cavalier Mfg Co v Employers Ins of Wausau*, 211 Mich App 330, 337; 535 NW2d 583 (1995). The *Beauchamp* standard, however, was determinative of plaintiff's liability in the underlying suit and thus is determinative to the facts in this appeal. See *Kachadoorian, supra*.

[2] On November 22, 1996, the Supreme Court *Cavalier Mfg v Employers Ins of Wausau*, 211 Mich App 330, 334; 535 NW2d 583 (1995) for reconsideration in light of *Travis v Golec Mfg*, 453 Mich 149; 551 NW2d 132 (1996). Order of the Supreme Court No. 103991 (issued November 22, 1996). Because the decision in *Cavalier* is based on a sound analysis, we rely on its holding in deciding this matter.

[3] The WDCA standard applicable in *Cavalier, supra*, was amended section 131, rather than *Beauchamp's* "substantial certainty" standard. Since amended section 131's standard is more strict than *Beauchamp's* standard, the holding in *Cavalier, supra*, is applicable to this case on appeal.